

Commissioner, Indiana Department of Environmental Management,  
Case No. 2009-18337-S,

v.

Stewart Recycling, Inc.,  
Monroe City, Knox County, Indiana  
2010 OEA 149, (10-S-E-4396)

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**OFFICIAL SHORT CITATION NAME:** When referring to 2010 OEA 149, cite this case as  
*IDEM v. Stewart Recycling, Inc., 2010 OEA 149.*

**TOPICS:**

Motion to Dismiss	I.C. § 13-30-3-5
untimely filed	I.C. § 23-1-24-1
registered waste tire storage	I.C. § 23-1-24-4
waste tire processing	329 IAC 15-3-9
Indiana Secretary of State	329 IAC 15-3-6
Registered Agent	329 IAC 15-3-2(2) and (3)
Office of Land Quality	329 IAC 15-5-1(2)
violation	329 IAC 15-5-3.5(1) and (2)
NOV (Notice of Violation)	329 IAC 15-3-17(c) (1) and (2)
Agreed Order	329 IAC 15-3-17 (h)(1) and (2)
Commisisoner's Order (CO)	329 IAC 15-3-7(j)(1), (2) and (3)
certified mail	327 IAC 15-2-5
service of process	40 CFR 262.11
incompetent	Ind. Trial R. 4.2(B)
president	Ind. Evid. R. 702
secretary	<i>Coulopoulos</i> , Cause No. 06-S-E-3683
same address	<i>Harry Randhawa, La Oasis, Inc.</i> , 2009 OEA 1
manure distribution	

**PRESIDING JUDGE:**

Mary L. Davidsen

**PARTY REPRESENTATIVES:**

IDEM: Justin D. Barrett, Esq.  
Respondent: Lawrence A. Vanore, Esq., David L. Guevara, Esq.;  
Taft Stettinius & Hollister, LLP

**ORDER ISSUED:**

September 22, 2010

**INDEX CATEGORY:**

Land

**FURTHER CASE ACTIVITY:**

Judicial Review

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STATE OF INDIANA )  
 )  
COUNTY OF MARION )

BEFORE THE INDIANA OFFICE OF  
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF: )  
 )  
COMMISSIONER, INDIANA DEPARTMENT OF )  
ENVIRONMENTAL MANAGEMENT, )  
Case No. 2009-18337-S, )  
Complainant, )  
 )  
v. ) CAUSE NO. 10-S-E-4396  
 )  
STEWART RECYCLING, INC., )  
Monroe City, Knox County, Indiana, )  
Respondent )

**FINDINGS OF FACT, CONCLUSIONS OF LAW, and FINAL ORDER**

This matter came before the Office of Environmental Adjudication (“OEA” or “Court”) on Complainant, Indiana Department of Environmental Management’s August 27, 2010 Motion to Dismiss (“Motion”). The parties fully briefed their positions and did not request oral argument. The Chief Environmental Law Judge (“ELJ”) having considered the petitions, evidence, and pleadings of the parties, now finds that judgment may be made upon the record. The ELJ, by substantial evidence, and being duly advised, now makes the following findings of fact and conclusions of law and enters the following Final Order:

**FINDINGS OF FACT**

1. Stewart Recycling, Inc., (“Stewart Recycling”) owns and/or operates a registered waste tire storage and processing facility at 10701 East Hamlin Chapel Road, Monroe City, IN (“Site”).
2. Online records of the Indiana Secretary of State’s office dated September 8, 2010 indicate that since 1993, Stewart Recycling’s Registered Agent is Eric Stewart, 10701 East Hamlin Chapel Road, Monroe City, Indiana. *September 10, 2010 IDEM Reply in Support of its Motion to Dismiss, Ex. 1.* Eric R. Stewart is listed as President, Sandra A. Stewart is listed as Secretary; no other individuals are specified on Stewart Recycling’s corporate listing with the Indiana Secretary of State.

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3. The Indiana Department of Environmental Management (“IDEM”) alleged that its Office of Land Quality staff found violations on Site during investigations on March 13, 2008, May 28, 2008, September 15, 2008, December 12, 2008 and March 17, 2009. *Petitioner’s July 29, 2010 Petition for Administrative Review, Adjudicatory Hearing, and Stay of Effectiveness (“Petition”), Ex. A, p.4 (IDEM Commissioner’s Order).*
4. I.C. § 13-30-3-3 requires IDEM to afford alleged violators the opportunity to resolve potential violations prior to litigation. On May 27, 2009, the IDEM Commissioner issued a Notice of Violation (“NOV”) to Stewart Recycling, alleging violations of 329 IAC 15-3-9, 329 IAC 15-3-6, 329 IAC 15-3-2(2) and (3), 329 IAC 15-5-1(2), 329 IAC 15-5-3.5(1) and (2), 329 IAC 15-3-17(c) (1) and (2), 329 IAC 15-3-17 (h)(1) and (2), 329 IAC 15-3-7(j)(1), (2) and (3), 40 CFR 262.11 and 327 IAC 15-2-5. *Petitioner’s July 29, 2010 Petition for Administrative Review, Adjudicatory Hearing, and Stay of Effectiveness (“Petition”), Ex. A, FINDING OF VIOLATION, p. 7, ¶ 15.* IDEM sent the NOV and accompanying Agreed Order by certified mail separately to Eric Stewart and to Sandra Stewart, both of Stewart Recycling, Inc., 10701 East Hamlin Chapel Road, Monroe City, Indiana. *Petitioner’s Ex. A, p. 4.* The parties do not dispute that Stewart Recycling received the NOV and Agreed Order on May 30, 2009. *Id.*
5. The NOV contained an offer to enter into an Agreed Order stating actions required to correct the violation. *Id., ¶16.*
6. The parties did not enter into an Agreed Order. *D., ¶¶17, 18.* After sixty (60) days passed after its issuance of the NOV and Agreed Order, on July 1, 2010, IDEM issued a Notice and Order of its Commissioner (“Commissioner’s Order” or “CO”) to Stewart Recycling for failure to comply with specified operational and reporting conditions of its registration, and for failure to maintain its financial assurance, in violation of 329 IAC 15, *et seq.* IDEM sent the CO by certified mail separately to Eric Stewart, certified mail article no. 91-7190-0005-2710-0006-3205, and to Sandra Stewart, certified mail article no. 91-7190-0005-2710-0006-3243, both of Stewart Recycling, Inc., 10701 East Hamlin Chapel Road, Monroe City, Indiana. *Respondent IDEM’s Motion to Dismiss (“Motion”), Exs.1, 2; July 1, 2010 Commissioner’s Order, Petitioner’s July 29, 2010 Petition for Administrative Review, Adjudicatory Hearing, and Stay of Effectiveness (“Petition”), Ex. A.* The CO certified article domestic return receipts, or “green cards”, were signed by Eric R. Stewart as received on July 6, 2010, for Sandra Stewart, *Motion, Ex. 1,* and for Eric R. Stewart. *Motion, Ex.2.*

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7. The CO required Stewart Recycling to do specified tasks. *CO, ORDER, p. 7 – 8, ¶¶ 1 through 13*. The CO informed Stewart Recycling that if Stewart Recycling did not file its objections via petition for administrative review with OEA within nineteen (19) days<sup>1</sup> from Stewart Recycling's receipt of the Notice and Order, then the Notice and Order would become effective and enforceable. *CO, EFFECTIVE DATE OF ORDER, p. 8*.
8. Stewart Recycling's July 29, 2010 Petition states "Stewart Recycling received a copy of the Commissioner's Orders on July 10, 2010, when Sandra Stewart signed for the mailing." *Petition, p. 2*.
9. Stewart Recycling, through Sandra Stewart, contends that her brother, Eric Stewart, is not competent to receive service of process, as a result of a 2002 "traumatic, work-related accident that caused him to suffer brain injury, leaving him impaired." *September 7, 2010 Stewart Recycling Inc.'s Response to IDEM's Motion to Dismiss, Ex. B, Affidavit of Sandra Stewart ("Affidavit"), ¶¶ 5, 6*. A review of Sandra Stewart's Affidavit does not assert particular medical expertise, but shows that she has personal knowledge of her observations of Eric Stewart's conduct, and their mother's statement that a CAT scan showed that Eric Stewart had brain damage. *Id., P. 6, 7, 8*. In its Reply, IDEM included a motion to strike Sandra Stewart's affidavit. *Reply*. Since his 2002 injury, Eric Stewart remains president of Stewart Recycling, but has made no business decisions nor does he handle business, financial or regulatory matters. *Affidavit, ¶¶4, 9*. Instead, his "work for Stewart Recycling has been limited to manual labor, driving and maintaining equipment, and other tasks in the yard." *Id., ¶ 9*. Sandra Stewart, Secretary and Treasurer, performs all of Stewart Recycling's financial and business functions, including "dealings and communications" with IDEM. *Id., ¶3*. Sandra Stewart is not always present at Stewart Recycling's office, as she also works for Senator Evan Bayh in his Evansville office. *Id., ¶¶ 2, 12*. Eric Stewart leaves mail on the desk for Sandra Stewart when she comes in to the office. *Id., ¶ 10*. Sandra Stewart recalled that she signed for certified mail on July 10, 2010, and stated her assumption in Stewart Recycling's Petition that the certified mail included the CO. *Id. ¶ 13*. On further review of the events on July 10, 2010, Sandra Stewart clarified her recollection that the unopened CO was in mail she picked up at "the office". *Id.* On August 24, 2010, Sandra Stewart realized that Eric Stewart had signed for her copy of the CO. *Id., ¶ 12, 13*.

**CONCLUSIONS OF LAW**

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<sup>1</sup> The language of I.C. § 13-30-3-5 referencing twenty (20) days, was interpreted as requiring 19 days in *Wayne Metal Products Company, Inc. v. Indiana Department of Environmental Management*, 721 N.E. 316 (Ind. Ct. App. 1999).

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1. The Indiana Department of Environmental Management (“IDEM”) is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per I.C. § 13-13, *et seq.* The Office of Environmental Adjudication (“OEA”) has jurisdiction over the decisions of the Commissioner of IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7, *et seq.*
2. This is a Final Order issued pursuant to I.C. § 4-21.4-3-27. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.
3. In this case, IDEM seeks dismissal, asserting that OEA lacks subject matter jurisdiction over Stewart Recycling’s untimely-filed petition for administrative review. When ruling on a motion to dismiss, “a court is required to take as true all allegations upon the face of the complaint and may only dismiss if the plaintiff would not be entitled to recover under any set of facts admissible under the allegations of the complaint.” *Huffman v. Office of Env’tl. Adjudication*, 811 N.E.2d 806, 814 (Ind. 2004). Determinations considering facts beyond the complaint are treated by the court as a motion for summary judgment. *Id.* Whether on a motion to dismiss or on summary judgment, all reasonable inferences must be drawn in favor of the non-moving party. *Meyers v. Meyers*, 861 N.E.2d 704, 705-706 (Ind. 2007).
4. In determining the facts at issue, this Court must apply a *de novo* standard of review to this proceeding. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993), *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771 (Ind. Ct. App. 2005). “The ELJ . . . serves as the trier of fact in an administrative hearing”. *Id.* Findings of fact must be based exclusively on the evidence presented to the ELJ. I.C. § 4-21.5-3-27(d). Deference to the agency’s initial determination is not allowed. *Id.* “*De novo* review” means that all issues are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings. *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247, 253 (Ind. Ct. App. 1981).
5. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env’tl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004)(appeal of OEA review of NPDES permit); *see also* I.C. § 4-21.5-3-27(d). While the parties disputed IDEM’s determination that Stewart Recycling received the CO and did not appeal it in a timely manner, OEA is authorized “to make a determination from the affidavits . . . pleadings or evidence.” I.C. § 4-21.5-3-23(b). “Standard of proof generally has been described as a continuum with levels ranging from a “preponderance of the evidence test” to a “beyond a reasonable doubt” test. The “clear and convincing evidence” test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test.” *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The “substantial evidence” standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test.

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*Burke v. City of Anderson*, 612 N.E.2d 559, 565, n.1 (Ind. Ct. App. 1993). *GasAmerica #47*, 2004 OEA 123, 129. *See also Blue River Valley*, 2005 OEA 1, 11-12. *Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service, ELF # 9810570/FID #1054, New Castle, Henry County, Indiana; Winimac Service, ELF #9609539/FID #14748, Winimac, Pulaski County, Indiana; HydroTech Consulting and Engineering, Inc. (04-F-J-3338)*, 2005 OEA 26, 41.

6. The parties dispute whether Respondent's Petition for Administrative Review in this forum was timely filed. A person who is "aggrieved or adversely affected" by, and wants to challenge, an agency action or order, to seek administrative review by filing a written petition for administrative review in compliance with I.C. § 4-21.5-3-7(a). Petitions for review of IDEM agency actions are filed with OEA, I.C. § 4-21.5-7, *et seq.*
7. I.C. § 13-30-3-5 provides that Commissioner's Orders ("CO") must be appealed to the Office of Environmental Adjudication before twenty (20) days of the CO's receipt. If not timely appealed, the CO takes effect. *Wayne Metal Products Company, Inc. v. Indiana Department of Environmental Management*, 721 N.E.2d 316, 319 (Ind. Ct. App. 1999); *In Re: Harry Randhawa, La Oasis, Inc.*, 2009 OEA 1, 3.
8. Stewart Recycling had to file its Petition for Administrative before twenty (20) days after it received notice of the CO to file an administrative appeal with OEA.
9. Stewart Recycling asserts that was not served upon receipt on July 6, 2010 by Eric Stewart, because Eric Stewart was not competent or was not believed to be competent to receive service of process. *Ind. Trial Rule. 4.2 (B)*; *Gourley v. L.Y.*, 657 N.E.2d 448, 450 n. 2 (Ind. Ct. App. 1995); *see also Kendall v. Primmer*, 662 N.E.2d 187 (Ind. Ct. App. 1996); *Munden v. Munden*, 398 N.E. 780, 682 (Ind. Ct. App. 1979). Stewart Recycling argues that it was served when Eric's sister Sandra Stewart personally received the CO on July 10, 2010. *Response, p. 3*. Thus, Stewart Recycling argues that its July 29, 2010 Petition for Review was timely filed.
10. OEA has examined prior challenges to dismissal of petitions for administrative review based on different dates of receipt by different people with access to mail received at one address. In *Indiana Dep't of Highways v. Dixon*, 541 N.E.2d 877, 880 (Ind. 1989), Dixon challenged his dismissal as an employee of the Indiana Department of Health. The administrative decision was sent to Dixon's last known address, a home he had shared with his mother. *Id.* Although Dixon no longer resided with her, his mother signed the certified mail receipt for the administrative decision. *Id.* Eventually, Dixon personally received the documents, then filed a petition for administrative review which was timely as to Dixon's personal receipt, but not timely as to receipt by Dixon's mother. *Id.* The Indiana Supreme Court held that Dixon was not deemed to have received the documents until he, personally, received them. *Id.* OEA relied upon *Dixon* in *Comm'r, Indiana Dep't of Environmental Management v. Peter*

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*Coules a/k/a Peter Coulopoulos d/b/a Western Scrap and Constance Coulopoulos*, OEA Cause 06-S-E-3683 . In *Coulopoulos*, IDEM sent its CO via certified mail to an address where Constance Coulopoulos shared housing with her sister. *Id.* Constance Coulopoulos' sister signed for the CO in her sister's absence, then forgot or discarded the CO. *Id.* Constance Coulopoulos eventually received the CO. *Id.* OEA held that, in *Coulopoulos*, Constance Coulopoulos was served when she received IDEM's determination, under circumstances where IDEM sent its determination via certified mail to a person's last known address.

11. Both *Dixon* and *Coulopoulos* concerned addressees who were individuals, and not part of corporations. In this case, Stewart Recycling is not an individual, it is a business entity in the form of a for-profit domestic corporation. *IDEM's September 10, 2010 Reply, Ex. 1. See also Comm'r, Indiana Dep't of Environmental Management v. Harry Randhawa, La Oasis, Inc.*, OEA Cause 07-S-E-4042, 2009 OEA 1. As a for-profit domestic corporation, Stewart Recycling is required to follow Indiana's legal requirements for corporations and registered agents. Indiana's Business Corporation statutes require such corporations to register their business office location and to appoint a registered agent, or to change their registered agent as their circumstances require, so that those interacting with the corporation may reasonably rely on an identified contact and address. I.C. § 23-1-24-1; I.C. § 23-1-24-4 (1986). Provisions in I.C. § 23-1-24, *et seq.*, allow a corporation to change its registered agent for circumstances appropriate to the particular corporation. As a result, the corporation may have service through a registered agent it deems qualified, without requiring those outside the corporation to investigate the personal circumstances of a corporate actor. In this case, Stewart Recycling has been receiving correspondence from IDEM about this matter since March, 2008. The May 27, 2009 NOV and Agreed Order included terms that further action would be taken by IDEM if the matter was not resolved by Agreed Order. Stewart Recycling should reasonably have expected further regulatory correspondence from IDEM. The parties do not allege any service deficiencies in IDEM's prior correspondence, all served in the same manner as the CO. IDEM reasonably relied on the accuracy of the service method it used, which method complied with state law concerning corporations.
12. Stewart Recycling has not presented substantial evidence that Eric Stewart is incompetent to receive service of process. Sandra Stewart's affidavit does not include qualifications which would establish her as a medical expert on her brother's incompetency. *See Ind. R. Evid. 702.* Nor does her affidavit testimony provide substantial evidence that Eric Stewart is incompetent for purposes of receiving service of process. Although Eric Stewart's unfortunate accident in 2002 tragically changed his life, the evidence before OEA shows that he is capable of signing the certified mail documents in a legible script, performing manual labor, driving and maintaining equipment, and other tasks in the yard. This evidence does not suffice to place Eric Stewart's competency in sufficient doubt for the purposes of receiving service of process. *Bellmore v. State*, 602 N.E.2d 111, 117 (Ind. 1992).

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13. Despite Eric Stewart's unfortunate circumstances, Stewart Recycling has been able to exercise its choice to change its registered agent since it deemed Eric incompetent to act in this capacity in 2002. However, Stewart Recycling did not. No evidence was presented that IDEM did not fulfill its service obligations in this case. In this case, undisputed substantial evidence shows that IDEM sent the CO, and the prior required documents, to Stewart Recycling at the addresses it provided, at the address for its registered agent, and that Stewart Recycling's registered agent received the CO on July 6, 2010.
14. OEA lacks subject matter jurisdiction over Respondent Stewart Recycling's petition for administrative review. Substantial evidence shows that Respondent Stewart Recycling received required notice on July 6, 2010, the date when the certified article domestic return receipt, or "green card", for Stewart Recycling's address, and addressed to the same address and registered agent addressee as Stewart Recycling provided to the Indiana Secretary of State. By substantial evidence, Respondent Stewart Recycling's July 29, 2010 filing of its Petition for Administrative Review exceeded the mandatory deadline required in I.C. § 13-30-3-5 and in I.C. § 4-21.5-3-7(a).
15. OEA does not have, and has no discretion to acquire, subject matter jurisdiction of a petition for administrative review filed after the deadlines mandated by statute. OEA must dismiss the Petition with prejudice. *Walker Mfg. Co v. Dep't of Local Gov't Finance*, 772 N.E.2d 1, 4-6 (Ind. Tax 2002); *In re: Objection to the Issuance of Notice of Decision, Murphy Oil USA, Inc., Seymour, Jackson County, Indiana*, 2004 OEA 51, 55; *Variance for Open Burning, Herring*, 2008 OEA 7; *In re: Objection to Denial of Excess Liability Trust Fund Claim, Frank Suverkup, Benzol Cleaning Co., Inc.*, 2004 OEA 48. As a matter of law, OEA lacks subject matter jurisdiction over this cause.

**FINAL ORDER**

**IT IS THEREFORE ORDERED** that the Petition for Administrative Review, Adjudicatory Hearing, and Stay of Effectiveness filed by Petitioner Stewart Recycling, Inc., is hereby **DISMISSED**, and the Indiana Department of Environmental Management's August 27, 2010 Motion to Dismiss is hereby **GRANTED**.

You are further advised that, pursuant to I.C. § 4-21.5-5, *et seq.*, this Final Order is subject to judicial review. Pursuant to I.C. § 4-21.5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

**IT IS SO ORDERED in Indianapolis, Indiana this 22nd day of September, 2010.**

Hon. Mary L. Davidsen  
Chief Environmental Law Judge